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Supreme Court of the United States

October Term, 1970.

No. 452

S. E. NICHOLS-DOVER Inc., SPENCER SHOE CORP., and IMAC FOOD SYSTEMS, Inc.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

JAMES L. BURKE,
Counsel for Petitioners,
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THE REPORTER COMPANY, INC., Walton, N. Y. 13856—607 865-4131—1970

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IN THE

Supreme Court of the United States

October Term, 1970.

No. .....

S. E. NICHOLS-HOVER, INC., SPENCER SHOE CORP., and IMAC FOOD SYSTEMS, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for the Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITION FOR WRIT OF CERTIORARI.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above case on September 15, 1969, and the supplemental judgment of that Court entered April 23, 1970.

Opinion Below.

The opinion of the U. S. Court of Appeals, Third Circuit, the decision and order and the supplemental decision and order of the National Labor Relations Board, as well as the Trial Examiner's decision are set forth at the end of this petition.

The judgment of the Court of Appeals for the Third Circuit was made August 14, 1969, and entered September

15, 1969, and a copy thereof is appended to the appendix of this petition. The supplemental judgment of that Court was made April 23, 1970, and issued May 15, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented.

In the decision and judgment of the Circuit Court of Appeals for the Third Circuit, the Court ordered that the 8(a)(5) bargaining portion of the Board's said order be remanded to the Board for further consideration in the light of *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U. S. 575.

The Board, on October 21, 1969, rendered a "Supplemental Decision and Order," and employing the language of *Gissel* found that "the violations of Section (a)(1) and (3) were of such egregious and pervasive character that the possibility of erasing their coercive effects and ensuring a fair election is slight."

The National Labor Relations Board on December 31, 1969, filed its motion for enforcement of the order issued October 21, 1969. Petitioner filed an answer with Court January 23, 1970, in which it opposed enforcement on the grounds that the Board's findings violate the requirements of *Gissel* and that the Board is obligated to make findings of fact based on cited evidence as a basis for its conclusions. The Court of Appeals requested a copy of the statement of position previously requested and previously submitted to the National Labor Relations Board, which copy was forwarded. Then the Court, without granting petitioner either opportunity to file a brief or give oral argument, entered judgment for enforcement on April 23, 1970.

1. The first question is, was the petitioner denied due process because not allowed to file a brief or present oral argument after the National Labor Relations Board's new findings?

There can be no doubt of petitioner's right to appeal the new findings. However, affirmative action was unnecessary since the Board's General Counsel immediately petitioned for enforcement.

The Circuit Court, in its decision, states petitioner did not request the opportunity to file a brief. It is submitted such a request is not a preliminary to the right of filing a brief and oral argument as set out in the Federal Rules of Appeals Procedure. Rule 31 thereof sets out the procedure for the moving party to file a brief with the right of the respondents to file an answering brief. Rule 34 states that "the Clerk shall advise all parties of the time and place at which oral argument will be heard."

Do these rights of brief and oral argument apply to enforcement proceedings? Rule 20 states they do so apply.

This petitioner as respondent was not advised it must request an opportunity to file a brief or for oral argument. The decision of the Court was rendered without either opportunity.

2. Did the Circuit Court err in assessing costs against this petitioner as respondent in the enforcement proceeding? Costs were assessed against respondent in the amount of $1,106.09 in the "supplemental" judgment. None were assessed in the original judgment.

In support of its contention that costs were improperly assessed, petitioner cites Rule 39(b) of the Federal Rules of Appellate Procedure which states:

> "Costs for and against the United States. In cases involving the United States or an agency or office thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with paragraph (a); otherwise costs shall not be awarded for or against the United States."

As to authorized by law, the remaining statutory reference is U. S. Code Title 28, Section 2412, that reads:

> "Except as otherwise provided by statute a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded the prevailing party in any *civil action* (italics added) brought by or against the United States * * *."

A motion to enforce the order of the National Labor Relations Board is not a "civil action" as the term is commonly understood. The words "civil action" connotes the rights involving the United States enforcement of property rights in an action for damages or injunction. It does not connote an administrative proceeding as is the instant matter.

3. A third question relates to the claim of this petitioner that the Circuit Court erred in its decision and judgment enforcing the Board's findings despite the objections raised in petitioner's answer for the following reasons:

The Court ordered the Board to make findings anew in the light of the *Gissel* case. In response, the Board made no findings of fact but produced a conclusion made *in camera*, "that the possibility of erasing their coercive effects and ensuring a fair election by the use of traditional remedies is slight."

The Court's request was for current findings to determine whether an election order should issue as of

October, 1969. The Board made no investigation and held no hearing although the last alleged unfair labor practice was in December, 1966. It simply rubber-stamped its previous determination using the language of the *Gissel* decision to gain judicial approbation.

Without factual data, to conclude that the employees as presently constituted would be influenced or coerced in their voting by occurrences of three to four years past is pure assumption. The fact that the employer is under completely new management and that ten or less of the employees of October, 1969, were employed in 1966, were not considered. It is emphasized that the Circuit Court by its remanding was not asking the Board simply to review its old record to determine whether error was made in light of *Gissel*, but to make a new decision as of October, 1969, as to the appropriateness of an election in light of *Gissel*. It would appear, when the Court requests the Board to make a finding, it is requesting a finding with the same legal validity that the Board vests findings in other matters under Section 9 (c) (1) of the Act and Section 10(b) and 10(c) of the Act where testimony on notice and finding are made based on evidence, otherwise the remanding becomes a purposeless procedure that produces a bare ministerial act on the part of the Board.

As the Court said in *Gissel* (p. 593), "In such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as determining employer misbehavior."

As this Court stated in *Ohio Bell Telephone Co. vs. Public Utilities Commission*, 301 U. S. 292:

> "Administrative agencies necessarily acquire special knowledge in the field of their activities and the acquisition of this knowledge is the purpose of their existence in many instances. Ac-

> cordingly, the field in which official notice may relieve the necessity of proof is broadened to permit administrative offices to use such knowledge, but administrative offices should make no use of their personal knowledge or of data accumulated by them unless the matter is disclosed and put upon the record so that the supposed fact may be supplemented, explained or refuted by contrary evidence, and so that a court, on judicial review, may be informed of what facts the agency has utilized, so as to determine the existence of evidence in support of its conclusion."

That the Board is subject to the Administrative Procedure Act, 5 U. S. Code, Section 500, etc., see *N. L. R. B. v. Indiana Electric Co.*, 318 U. S. 9.

4. Petitioner was denied certiorari upon application following the August 4, 1969, decision of the Circuit Court. The Solicitor General objected to the petition, among other reasons, because the application was premature until the Board had reconsidered upon remand from the Court. Upon the assumption that certiorari was denied because of prematurity, petitioner restates its reasons for the writ as in the previous petition, and the question is, did the Circuit Court err in affirming the Board's decision because

A. The employer was not obligated to respond to an ambiguous request for recognition.

Until this case, the Board had consistently answered, no. *C. L. Bailey Grocery Co.* (1952), 100 N.L.R.B. 576; *Curry Lumber Company* (1953), 102 N.L.R.B. 406, and *Parker Bros.* (1952), 101 N.L.R.B. 872. Also, so held the Circuit Courts. In *N.L.R.B. v. Jackson Press*, 201 F. 2d 541 (C.A. 7), "In view of the prohibition of the Act against recognition by an employer of a union which does not represent a majority, we do not believe it incumbent on an employer to resolve an ambiguity in a request to bargain. On the contrary we believe that a union representa

tive, who is presumably versed in labor matters, should clearly define the unit for which recognition is sought. Such a requirement imposes on the union representative only the obligation to say what he means. Failing to do so, he cannot be considered as having made the sort of request to bargain which imposes on an employer a legal obligation to comply." A similar holding was made by the 8th Circuit, *N.L.R.B. v. Morris Novelty Co.*, 378 F. 2d 1000.

B. The General Counsel did not sustain his burden of proof of majority of employees requesting union representation.

The question relates to the quality of proof necessary to be supplied by the General Counsel of the National Labor Relations Board to bring about employer recognition based on authorization cards. The unit numbered 132 employees on October 27, 1966, and the Board found and the court upheld the finding of 72 valid authorization cards. Petitioners attacked the cards on a number of grounds. The principal ground was not touched upon and was totally ignored by the Circuit Court's opinion. That principal ground is that the General Counsel, as part of his acknowledged burden of proof, must prove valid authorization cards in the required number. As J. Friendly pointed out in *N.L.R.B. v. Golub Corp.*, 388 F. 2d 921: "Question has been raised whether proof of a pattern of misrepresentation by a particular solicitor may not require the General Counsel to come forward with testimony of all signers." In that case the court did not rule on the question, finding no 8(a) (5) violation.

In the instant case, thirteen cards were admitted as valid without any testimony of the card signers and solely on the testimony of a union solicitor, Hollinger. The Board, in *Henry Colder Co.*, 163 N.L.R.B. (1967), states its rule that the burden of proof on union authorization card issues is always with the General Counsel that the

rule "merely requires the Employer to go forward with proof to the contrary after the General Counsel has established a prima facie case * * *."

Oral testimony from a prejudiced witness that certain individuals signed cards on a certain date is the thinnest form of prima facie proof. So thin, in fact, that in usual judicial proceedings it would not be prima facie proof. However, the Board to relieve itself of an evidentiary burden has taken that stand. The probative value being weak, rebuttal requirements should not be great. The said solicitor Hollinger alone solicited 29 cards (pp. 110-112). Thirteen of these employees did not testify. Of the remaining sixteen who did testify, nine, or more than one-half, swore that Hollinger had obtained their signatures by making misrepresentations. He threatened one employee, Satterfield (p. 115), with loss of employment if she didn't sign. Two employees testified (pp. 323-324 and 388-390) that this solicitor asked them to predate their cards. He denied this and denied the misrepresentation. The Board on credibility sustained Hollinger against the testimony of nine employees. The Circuit Court rubber-stamped the Board's findings.

Of the misrepresentations, four cards were gained by falsely stating the union had a majority of employees at the time of solicitation (pp. 323-324, 354-356, 392-393, 387). Two of the cards were of individuals who were not employees when signed (p. 286) and one, Leona Morris, who was absent from the employee list. The Trial Examiner counted them. The Board and the court avoided the matter by finding they were not necessary for a majority. The fact that complete credence was given the person who solicited and tried to use these cards, Mr. Hollinger, had no effect. Two employees were promised if they signed they'd save initiation fees (pp. 348-349, 352).

When the General Counsel relies solely on the testimony of a union solicitor to establish the validity of thirteen authorization cards of employees who did not testify and more than half the other employees whom he had solicited testified he had made false representations to gain their signature, the credibility of this solicitor is sufficiently rebutted to require the General Counsel to produce further evidence to establish validity of the consent of the thirteen employees.

C. The Board improperly denied the right of free choice to seven employees who, of their own volition, reversed authorization cards.

Seven employees wrote to the union to revoke their authorization cards. The record shows the employees had reported the union had made threats to obtain cards. The company did not coerce or even urge employees to revoke their cards. As testified by the Board's chief complainant, Mrs. Hennessey (pp. 179-80), quoting the company manager, "He spoke about this letter and if anybody wanted their card back they could get the card back, it was a free country. If you wanted it back, you could get it back." Q. "Did he indicate the company would help you in any way?" A. "No." Q. "Did he give you any suggestions as to how to get the card back?" A. "No." It was the same with all who wrote the union to revoke their authorization (pp. 80-91, 296, 302, 304-308, 308-318, 62-80). The company did inform them they could revoke the authorization. The company did not urge, threaten, or coerce this action, yet was found to have committed a violation of Section 8(a) (1) in so doing.

The Board improperly included in the valid authorization the cards of seven employees who wrote the union revoking their authorization, solely because it found the employer violative of Section 8(a) (1) in advising them

of their rights and letting them use company facilities to do so. It would seem the decision should have been based on a finding of the intention of these employees rather than to mechanically deprive them of their statutory right of selection because of alleged mildly questionable conduct of the employer. However, no attempt by the Board or court was made to delve into the validity of the consent of these employees.

Statement.

Since *N.L.R.B. v. Gissel Packing Co.*, 395 Sup. Ct. 575, 23 L. Ed. 2d 547, in approving authorization cards as a method of selecting a bargaining agent, it is doubly important to protect the objective free choice of the employees by insuring, as the decision states, that the cards are valid and are not obtained through misrepresentation.

The Court should allow employers the normal statutory privilege of reviewing Board decisions and not to suffer imposition of costs otherwise not assessed because of the employer's presumed impertinence in disturbing the Court the second time with the Board's errors.

Moreover, the Board should be required to bare the basis of its findings as in any other administrative proceeding, so that the Courts may test its primary function, that of protecting the free choice of employees and that it not pursue the tempting alternative of denying free choice to employees to penalize employers it deems obstructive.

In addition, judicial administration should require some consistency in Board rulings. In question 4a, on the matter of an ambiguous demand, the Board and court went counter to established rulings. In question 4b, the Board with court approval found no misrepresentation in factual situations where misrepresentations were customarily

found in the past. Finally, the administration of justice should not deprive employees of their right to revoke an authorization prior to a request for recognition, solely because of alleged relatively minor misconduct of an employer. In short, and because of *Gissel*, sound administration would require a focus on the method of obtaining of authorization cards and the need of substantial assurance that these proceedings reflect the wishes of the employees.

Reasons for Granting the Writ.

In part repeating, the writ should be granted to show to the far-flung administration of the Labor Board the necessary insistence by the courts that the Board take precautions in its proof and in its findings that authorization cards accurately represent the wishes of the employees. This requires sensitivity to the testimony of an admittedly biased solicitor, some granting of credence to the testimony of employees as against such a solicitor and finally the abandonment of mechanisms such as allowing the solicitor to prove validity of cards against impugning testimony and the mechanism of wiping out the independently expressed wishes of employees in revoking cards because of an alleged contributing violation of the act by an employer.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JAMES L. BURKE,
Attorney for Petitioners,
315 Lake Street,
Elmira, New York.

APPENDIX OF DECISIONS.

Supplemental Judgment of the Court of Appeals, Third Circuit.

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

S. E. NICHOLS-DOVER, Inc., SPENCER SHOE CORPORATION, and IMAC FOOD SYSTEMS, Inc.,

Respondents.

No. 17,479

Before:

McLaughlin, Kalodner and Van Dusen, Circuit Judges.

THIS CAUSE was heard upon the application of the National Labor Relations Board to enforce its order dated October 18, 1967, against the above-named Respondents, their officers, agents, successors, and assigns. The Court having heard argument of respective counsel on May 5, 1969, and having considered the briefs and transcript of record filed in this case, on August 4, 1969, handed down its opinion granting enforcement in part of the Board's said order; and remanding the 8(a)(5) bargaining portion of the Board's order to the Board for further consideration in the light of *NLRB v. Gissell Pack-*

ing Co., Inc., et al., 37 N. W. 4536 (6.16.69). Judgment in accordance with that opinion was entered on September 15, 1969. Thereafter, pursuant to remand, the Board on December 31, 1969, filed with this Court its motion for enforcement of its order of October 18, 1967, as reaffirmed by its supplemental decision and order issued on October 21, 1969, against the above-named Respondents, their officers, agents, successors and assigns. The Court, having considered the record, statements of position filed by the parties, and the Respondents' answer to the said motion, entered its order on March 10, 1970, granting enforcement of the Board's said order as reaffirmed. After consideration of the record, including Respondents' Objection to Proposed Judgment and the failure of respondents to request permission to file a brief or to present argument in their answer filed 1/23/70 to Petitioner's Motion for Enforcement of Its Order, and of 28 U. S. C. 2412 and Rule 39(a) and (b) of the Federal Rules of Appellate Procedure, it is hereby

ORDERED AND ADJUDGED by the Court that the order of the National Labor Relations Board of October 18, 1967 as reaffirmed on October 21, 1969, in said proceeding be enforced, and that Respondents, S. E. Nichols-Dover, Inc.; Spencer Shoe Corporation; and IMAC Food Systems, Inc., their officers, agents, successors and assigns, abide by and perform the directions of the Board's said order as reaffirmed.

IT IS FURTHER ORDERED, that costs shall be taxed against Respondents.

Dated: April 23, 1970

By the Court:

FRANCIS L. VAN DUSEN
Circuit Judge

Certified as a true copy of the supplemental judgment dated April 23, 1970, and issued in lieu of a formal supplemental mandate on May 15, 1970.

Test:

THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit.

Costs taxed in favor of petitioner as follows:

Brief for petitioner	$196.04
Appendix	+910.05
Total	$1106.09

Supplemental Decision and Order of National Labor Relations Board.

179 NLRB No. 44

D-3363
Dover, Delaware

UNITED STATES OF AMERICA,

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

S. E. NICHOLS-DOVER, INC.; SPENCER SHOE CORPORATION and IMAC FOOD SYSTEMS, INC.

and

RETAIL STORE EMPLOYEES UNION, LOCAL #692 RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

Case 5-CA-3664

On October 18, 1967, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,[1] finding that the Respondents had engaged in and were engaging in certain unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, and ordering the Respondents to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act including an order directing the Respondents to bargain with the Union. Thereafter, the Board filed a petition for enforcement of the

[1] 167 NLRB No. 121.

Order with the United States Court of Appeals for the Third Circuit. On June 16, 1969, the Supreme Court of the United States issued its opinion in *N.L.R.B. v. Gissel Packing Company*, 395 U. S. 575, in which it laid down certain guidelines relative to the propriety of finding violations of Section 8(a)(5) and issuing orders to bargain upon such violation or violations of other sections of the Act.

On August 4, 1969, the Third Circuit issued its decision in which it affirmed the Board's conclusions that Respondents had violated Section 8(a)(1) and (3) of the Act. The Court further found that, on the date the Union demanded recognition, it held valid authorization cards from a majority of the employees and "that Nichols refused to bargain under Section 8(a)(5) by attempting to undermine this majority. . . .". However, pursuant to the Board's suggestion, the Court remanded the Section 8(a)(5) portion of the case to afford the Board an opportunity to "consider its remedial bargaining order in the light of *Gissel*."[2] Pursuant to the Court's remand the Board issued a Notice inviting the parties to submit statements of position with respect to the application of *Gissel* to this proceeding. Respondents and the General Counsel filed statements in support of their respective positions. We have again reviewed the entire record, including the statements of position, and having reconsidered the matter, affirm the Board's original finding and order in this respect for the reasons stated below.

In its original decision the Board found, in agreement with the Trial Examiner, that the Respondents had engaged in violations of Section 8(a)(1) and (3) in that they coercively interrogated employees concerning their union sympathies and activities; solicited employees to withdraw union designation cards previously signed and

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[2] *N.L.R.B. v. S. E. Nichols-Dover, Inc.*, F. 2d , 71 LRRM 3146 (C.A. 3, No. 17479, August 4, 1969).

assisted employees in effectuating withdrawals; created an impression of surveillance of the union activities of employees; and discriminatorily discharged two union adherents. The Board also found that at the time of its original bargaining request the Union held valid authorization cards from a majority of the employees in an appropriate unit and that Respondents violated Section 8(a)(5) when they refused to bargain with the Union.

Having carefully considered the matter, we find that the violations of Section 8(a)(1) and (3) were of such an egregious and pervasive character that the possibility of erasing their coercive effects and ensuring a fair election by the use of traditional remedies is slight. In these circumstances, we are of the opinion that the rights of the employees and the purposes of the Act may be best effectuated by reliance on the employee sentiments expressed by the authorization cards and that a bargain-

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We note that this is the third in a series of unfair labor practice proceedings arising out of efforts of Respondent Nichols to prevent unionization of the Dover facility. In *S. E. Nichols-Dover, Inc.*, 159 NLRB 1071, enfd. 374 F. 2d 115 (C.A. 3, 1967), the Board affirmed the Trial Examiner's findings of discriminatory discharge, interrogation of employees, and surveillance of union activities in the Employers' effort to counter the Union's initial attempt to organize employees following the store's opening in August 1965. Organization efforts lapsed for 10 months. When organization was resumed it was met by concerted employer opposition which led to an eventual finding by the Board that Respondent Nichols was guilty of discriminatory discharge, interrogation of employees, surveillance of union activities, unlawful solicitation of revocations of employee authorization cards, and the unlawful promising and conferral of benefits during the organization campaign. *S. E. Nichols-Dover, Inc.*, 165 NLRB No. 135. The instant case presents a continuation of the pattern of antiunion activity at the Dover store. We also note that efforts by this union to organize employees at the Elmira, New York store owned by Nichols' parent corporation gave rise to the commission of unfair labor practices. See *N.L.R.B. v. S. E. Nichols Company*, 380 F. 2d 438 (C.A. 2, 1967).

ing order should issue.[1] Accordingly, we shall reaffirm the findings and remedy provided in our original Decision and Order.

Order

Based on the foregoing and the entire record in this case, the National Labor Relations Board hereby affirms the Order issued in this proceeding on October 18, 1967.

Dated, Washington, D. C. Oct 21 1969

JOHN H. FANNING,
Member

HOWARD JENKINS, JR.,
Member

SAM ZAGORIA,
Member

NATIONAL LABOR RELATIONS BOARD

(Seal.)

[1] *N.L.R.B. v. Gissel Packing Company*, 395 U. S. 575, 614.

Judgment of the Court of Appeals, Third Circuit.

UNITED STATES COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

: NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

S. E. NICHOLS-DOVER, Inc., SPENCER SHOE CORPORATION, and IMAC FOOD SYSTEMS, Inc.,

Respondents.

No. 17,479

Before:

McLaughlin, Kalodner and Van Dusen, Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board to enforce its order dated October 18, 1967, against S. E. Nichols-Dover, Inc., Spencer Shoe Corporation, and IMAC Food Systems, Inc., their officers, agents, successors, and assigns. The Court heard argument of respective counsel on May 5, 1969, and has considered the briefs and transcript of record filed in this cause. On August 4, 1969, the Court, being fully advised in the premises, handed down its opinion granting in part enforcement of the Board's said order; and remanding the 8(a)(5) bargaining portion of the Board's order to the Board for further consideration in the light of *NLRB v. Gissell Packing Co., Inc., et al.*, 37 L. W. 4536 (6.16.69). In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Third Circuit that S. E. Nichols-Dover, Inc., Spencer Shoe Corporation, and IMAC Food Systems, Inc., their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in any labor organization by discriminating in regard to hire, tenure, or other conditions of employment.

(b) Interrogating employees about a union or about their attitude toward the Union.

(c) Encouraging or in any manner aiding their employees to withdraw their membership from or support for any union or to discourage the employees in any manner from attending union meetings.

(d) In any other manner, interfering with, restraining or coercing their employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or any mutual aid or protection, and to refrain from any and all such activities except to the extent that any such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Offer Elaine Hennessy and Delores Ippolito reinstatement to their former positions even though this may necessitate displacement of present incumbents (or, if the position of either no longer exists, to a substantially equivalent position) without prejudice to seniority or other rights and privileges, and to make each whole for any

loss of earnings suffered by payment to each of a sum of money equal to the amount she would have earned from the date of her discharge to the date of Respondents' offer of reinstatement, less her net earnings during said period. Backpay shall be computed on a quarterly basis in a manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon at the rate of 6 percent per annum computed quarterly.

(b) Notify the said Elaine Hennessy and Delores Ippolito, if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security records, timecards, and personnel records and reports necessary to analyze the amount of backpay due and the right of reinstatement.

(d) Post at their place of business at Dover, Delaware, copies of the notice attached hereto as Appendix. Copies of such notice, on the forms provided by the Regional Director for the Fifth Region, (Baltimore, Maryland), shall, after being duly signed by authorized representatives of Respondents, be posted immediately upon receipt thereof and be maintained for a period of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that such notices are not altered, defaced, or covered by any material.

(e) Notify said Regional Director, in writing, within 10 days from the date of this Judgment, what steps the Respondents have taken to comply herewith.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that the 8(a)(5) bargaining portion of the Board's said order be, and it is hereby remanded to the Board for further consideration in the light of *NLRB. v. Gissell Packing Co., Inc., et al.*, 37 L. W. 4536 (6.16.69).

By the Court

Dated: September 15, 1969

FRANCIS L. VAN DUSEN
Circuit Judge

Appendix

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A Judgment of the United States Court of Appeals enforcing in part an order of the

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT (AS AMENDED)

we hereby notify our employees that:

WE WILL NOT discourage membership in RETAIL STORE EMPLOYEES' UNION, LOCAL #692, RETAIL CLERKS INTERNATIONAL UNION, AFL-CIO, or any other local organization, by discriminating as to the hire, tenure or any other term or condition of employment of any of our employees.

WE WILL NOT ask employees about a union or about their attitude toward any union; and we will not encourage or aid any employee in any manner whatsoever to withdraw his or her membership from, or her support for any union.

WE WILL NOT, in any other manner, interfere with, restrain or coerce our employees in the exercise of their right to self-organization; to form, join or assist a labor organization, to bargain collectively through a bargaining agent chosen by themselves; to engage in any other concerted activities for the purposes of collective bargaining or other mutual aid or protection; or to refrain from any such activities (except to the extent that the right to

refrain is limited by the lawful enforcement of a lawful union security requirement).

WE WILL offer Elaine Hennessy and Delores Ippolito their former or substantially equivalent jobs (without prejudice to seniority or other employment rights and privileges) and we will pay each for all loss suffered because of our discrimination against her.

All our employees are free to become or remain members of any labor organization or to refrain from becoming such members.

Dated .....

S. E. NICHOLS-DOVER, INC.
(Employer)

By .....
(Representative) (Title)

Dated .....

SPENCER SHOE CORPORATION
(Employer)

By .....
(Representative) (Title)

Dated .....

IMAC FOOD SYSTEMS, INC.
(Employer)

By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Building, Room 1019, Charles Center, Baltimore, Md. 21202 (Tel. No. 962-2909).

Decision of Court of Appeals, Third Circuit.

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 17479

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
S. E. NICHOLS-DOVER, Inc., SPENCER SHOE CORPORATION, and IMAC FOOD SYSTEMS, Inc.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued May 5, 1969

Before:

McLaughlin, Kalodner and Van Dusen, Circuit Judges.

Opinion of the Court.

(Filed August 4, 1969)

By VAN DUSEN, Circuit Judge.

The National Labor Relations Board petitions for enforcement of its October 18, 1967, order,[1] entered in favor of the Retail Store Employees' Union (the Union) and against respondents, S. E. Nichols-Dover, Inc. (Nichols), Spencer Shoe Corporation (Spencer), and IMAC Food

[1] Reported at 167 N.L.R.B. No. 121.

Systems, Inc. (IMAC). See 29 U. S. C. §160(e). The order directed the respondents to: (a) cease and desist from certain unfair labor practices under §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act (the Act), 29 U. S. C. §158(a)(1) and (3); (b) offer reinstatement and back pay to two employees found to have been unlawfully discharged by Nichols under §8(a)(3) of the Act; (c) upon request, bargain collectively with the Union as the exclusive representative of the employees of Nichols, Spencer, and IMAC.

The Nichols department store in Dover, Delaware, is one of several such stores located in the eastern United States and owned by a parent corporation. Spencer and IMAC are licensees of Nichols and operate, respectively, the shoe shop and the snack bar within the Dover store. The Union has been attempting to organize the employees of the store since it opened in August 1965.[2]

With the summer of 1966, the Union drive entered a more intensive phase involving the solicitation of authorization cards. Conflicting testimony was given at the hearing regarding the manner in which Nichols responded to this new campaign. The examiner, however, credited testimony given by the employees, which is entitled to our acceptance, see *Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, 495-97 (1951), and which was to the following effect. Nichols representatives convened several meetings

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[2] Shortly after the opening, Nichols discharged two employees because, the Board held in prior unfair labor practice proceedings, of their Union sympathies. Reinstatement of both employees was ordered. See *N.L.R.B. v. S. E. Nichols-Dover, Inc.*, 159 N.L.R.B. 1071 (1966), enf. 374 F. 2d 115 (3rd Cir. 1967); *S. E. Nichols-Dover, Inc.*, 165 N.L.R.B. No. 135 (1967). Also, we note, parenthetically, that efforts by this Union to organize employees at the Elmira, New York, store owned by Nichols' parent corporation gave rise to the commission of unfair labor practices. See *N.L.R.B. v. S. E. Nichols Company*, 380 F. 2d 438 (2nd Cir. 1967).

of store employees.' The officials declared that the store did not need a middleman (the Union), and emphasized that any employee who had signed an authorization card had a right to revoke it. They also assisted with letters of revocation in ways calculated to insure their effectiveness, such as suggesting that carbon copies be made for safekeeping in the Nichols office and providing stationery, postage, the Union's address, and mailing services. Store Manager Jones and other officials spoke with several employees individually, asking them whether they had been approached by Union organizers and how they and their co-workers felt about the Union. In addition, Jones told Mrs. Ippolito, a Union sympathizer, that he could not understand why anyone would want to pay Union dues when they could simply request a raise. He also warned her that he had placed a spy at a Union meeting she had attended.

On October 27, 1966, Nichols received a letter from the Union dated the previous day, stating that it represented an "overwhelming majority of the employees in the S. E. Nichols store," offering to substantiate such majority by proof, and "request[ing] a meeting to commence negotiations for a collective bargaining agreement". Nichols responded, under date of November 1, that it "cannot at this time consent to recognize the . . . Union as bargaining agent at the Dover store," suggesting an election be held instead. It cited "pending charges against the union, alleging coercive activity," as well as alleged statements of employees indicating that only a small minority actually desired representation and that

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The record does not disclose what the substance of these charges was, although it is apparent that they were later dismissed. We note that Nichols would have been entitled to insist on an election at that time without the necessity of citing any such justification or of submitting to a card check. See footnote 7.

some feared Union retaliation if they failed to support it.

Several weeks later, Jones became angry over a work dispute between three office employees, including Mrs. Ippolito and also Mrs. Hennessy, who was an active Union organizer. He threatened to fire all of them if another such argument arose, adding that he would lock the store's doors rather than open them to the Union. Three weeks later, on December 28, 1966, Mrs. Ippolito and Mrs. Hennessy were discharged along with a large number of temporary Christmas help. The Union, which had already filed unfair labor practice charges against Nichols on December 5, amended the charges to include an allegation that they had been unlawfully discharged because of their Union activity.

A complaint issued from the General Counsel and a hearing was conducted before a trial examiner. In his decision of June 20, 1967, the examiner held that the respondents had committed various unfair labor practices under §8(a) of the Act. Specifically, he found that the statements made by Nichols representatives at the group meetings and also during interrogations of individual employees unlawfully tended to coerce the employees into revoking their authorization cards in violation of §8(a)(1). Also found violative of §8(a)(1) were the statements made by Jones to Mrs. Ippolito. Furthermore, her discharge, along with that of Mrs. Hennessy, was held to be discrimination for their Union sympathies in violation of §8(a)(3). Finally, he concluded that Nichols had unlawfully refused to bargain with the Union upon request under §8(a)(5). This finding was predicated on determinations that the Union's letter, received by Nichols on October 27, was a demand for recognition and bargaining; that the appropriate bargaining unit encompassed the employees of Nichols, Spencer and IMAC; and that, on October 27, the union numbered 133 employees, of whom 77—a clear majority—had signed and returned to the Union

valid authorization cards. A bargaining order was recommended. The Board affirmed the examiner's decision and recommended order, and now petitions us for its enforcement. For the reasons given below, we have concluded that enforcement should be granted.

There is substantial evidence on this record, considered as a whole, to support the examiner's finding that Nichols violated §§ 8(a)(1) and (3) of the Act. See *Universal Camera Corp. v. Labor Bd.*, *supra*, at 487-88.

The credited testimony on the subject of the group meetings indicated that Nichols unlawfully attempted to persuade those employees who had signed cards to revoke them. See *N. L. R. B. v. Elias Brothers Big Boy, Inc.*, 327 F. 2d 421 (6th Cir. 1964). Questioning of individual employees designed to elicit information about the activities of Union organizers and the sympathies of co-workers was not permissible interrogation. See *N. L. R. B. v. Elias Brothers Big Boy, Inc.*, *supra*; *N. L. R. B. v. S. S. Logan Packing Company*, 386 F. 2d 562 (4th Cir. 1967). And the various statements which Jones made to Mrs. Ippolito were unlawful, not only as creating an impression of surveillance, see *N. L. R. B. v. S. S. Logan Packing Company*, *supra*, but also as constituting an implied threat of discharge for Union activity, see *N. L. R. B. v. Marsh Supermarkets, Inc.*, 327 F. 2d 109 (7th Cir. 1963), cert. den. 377 U. S. 944 (1964), and an actual threat of plant closure, see *N. L. R. B. v. Winn-Dixie Stores, Inc.*, 341 F. 2d 750 (6th Cir.), cert. den. 382 U. S. 830 (1965). We agree with the Board that these acts interfered with, restrained, or coerced the employees in the exercise of their rights, in violation of §8(a)(1).

As for the alleged violation of §8(a)(3), respondents and the Union introduced sharply conflicting testimony concerning the reasons for Mrs. Ippolito's and Mrs. Hennessy's discharge. The trial examiner discredited Nichols' assertion that they were let go as part of the normal post-

Christmas layoff and that Mrs. Ippolito had exhibited "incompatibility" and "bad attitude" and Mrs. Hennessy a habit of smoking in prohibited areas.[4] He found that both had been satisfactory employees and that Nichols, knowing of their Union sympathies, had fired them for that reason. We accept such a finding since it is based on assessments of credibility. Also, the Board was entitled to infer that the justifications offered by Nichols do not have the ring of truth.

For example, such explanations as were given to Mrs. Ippolito and Mrs. Hennessy at the time of their discharge were lacking in logic and consistency. Each had begun work for Nichols-Dover when it opened in the summer of 1965. From initial assignments on the main floor of the store, they had advanced by late summer 1966 to positions in the office which entailed increased responsibilities, including the occasional training of other employees. On December 28, 1966, however, both were terminated with the explanation that they were being laid off because the Christmas rush was over. Yet neither had been hired on that account. Indeed, several store workers with less seniority were retained and 29 new employees were hired during the first three months of 1967. Nevertheless, the "layoffs" of Mrs. Ippolito and Mrs. Hennessy were not made subject to recall, nor were they ever reoffered jobs by Nichols. Moreover, the Board was entitled to infer that the revised justifications later offered at the hearing—Mrs. Ippolito's "bad attitude" and Mrs. Hennessy's smok-

[4] Cephas, a former assistant manager called by the General Counsel, testified that Mrs. Ippolito was lazy, disobedient, and irritable, and that customers had complained about her. He also testified that Mrs. Hennessy was difficult in passing on refund claims, that he had seen her smoking in forbidden areas and that he had asked her to stop. However, the examiner noted that this witness had reasons for bias at the time of his testimony.

ing—bear the hallmarks of afterthought. Thus, conflicting testimony was given as to whether either was warned, while an employee of her alleged misbehavior. And Nichols officials were vague when asked to describe specific instances of complaints about them by customers. Questioned as to why in the past Mrs. Ippolito had been promoted instead of discharged for her alleged attitude, Jones was unable to reply. Regarding Mrs. Hennessy, there was testimony that smoking regulations were frequently disregarded, not only by other employees but by members of the managerial staff as well. The Board was justified in concluding that the discharges of these two employees were discriminatory under §8(a)(3) of the Act.[1]

We pass finally to the question of whether there was a §8(a)(5) refusal to bargain here, and, if there was, what the appropriate remedy should be. Fortunately, we have the benefit of a recent Supreme Court decision involving facts very similar to the instant case and presenting this legal issue. *N. L. R. B. v. Gissel Packing Co., Inc., et al.*, 37 L. W. 4536 (6-16-69). There Chief Justice Warren, speaking for a unanimous Court, reaffirmed the use of authorization cards as an acceptable means of creating representative status and a duty to bargain. His opinion also sanctioned the bargaining order as a

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[1] A similar inference was appropriate concerning the other justification offered to Mrs. Ippolito at the time of her discharge by the assistant manager, who apparently was commissioned by Jones to notify her: "if you want a reason, incompatibility".

[2] We think this conclusion is warranted by the record even without the testimony of Cephas, who related that a store official had told him, a week before, the fact that Mrs. Ippolito and Mrs. Hennessy were to be fired on account of their Union activities. Cephas had himself been suddenly discharged by Nichols shortly before the hearing, but, despite his "strong motivation . . . to consciously or unconsciously make a case against his employer", the examiner credited his testimony on this point.

remedy for an employer's failure to undertake such duty, if he instead ". . . committed independent unfair labor practices which . . . made the holding of a fair election unlikely . . . ."

In the instant case, we agree with the Board's conclusion that the Union's letter, received by Nichols on October 27, 1966, constituted an unambiguous demand for recognition and bargaining. Nichols' November 1 response, declining to bargain and suggesting an election, was, without more, a permissible response to that demand.[7] However, instead of proceeding to an election, Nichols embarked upon the unfair labor practices described above, which, at the very least, had a "tendency to undermine majority strength and impede the election processes." 37 L. W. 4547. The Supreme Court makes clear in *Gissel* that this type of response by an employer constitutes a §8(a)(5) refusal to bargain for which a bargaining order is an appropriate remedy.

Remaining for discussion is Nichols' contention that the Union lacked a valid majority of employees in the appropriate bargaining unit as of the date of the demand for recognition. The trial examiner determined that the

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[7] *Gissel* states that present Board policy, left undisturbed by the Supreme Court in that decision, is that "[w]hen confronted by a 'recognition demand based on possession of cards allegedly signed by a majority of his employees, an employer need not grant recognition immediately, but may . . . decline the union's request and insist on an election . . .'" 37 L. W. at 4540. Nor is he "obligated to accept a card check as proof of majority status . . . and he is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status." *Id.* at 4545.

[8] Employee turnover in the Nichols store since October 1966 would not affect the power of the Board to issue a bargaining order at the present time. See *Gissel*, *supra*, 37 L. W. at 4545-46, and cases there cited.

appropriate unit should include employees of Nichols and its licensees, Spencer and IMAC.[9] Within this unit, he specifically found qualified as employees the two previously discharged discriminatees who had been held entitled to reinstatement,[10] four part-time workers, and one individual whose status as an employee on the date of the demand for recognition was in dispute. Such discretionary determinations are peculiarly within the Board's expertise and we decline to interfere with them here.[11] See *Packard Co. v. Labor Board*, 330 U. S. 485,

[9]Respondents contend in their brief that Nichols had a good-faith doubt as to the proper inclusion of Spencer and IMAC in the unit, apparently on the theory that such a doubt would prevent a finding of a §8(a)(5) refusal to bargain. Under current Board policy, however, as described by the Supreme Court in *Gissel*, an employer's good-faith doubt is largely irrelevant; he "can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct . . .". 37 L. W. at 4540-41. In addition, we note that Nichols failed to mention the appropriateness of the unit in its letter of November 1, 1966.

[10]See footnote 2.

[11]We note that ingress to areas operated by Spencer and IMAC is controlled by Nichols, so that they are open only during Nichols store hours. Also, Spencer and IMAC do not advertise on their own, or display any signs to apprise the public that they are under separate control. Snack bar employees use many of the same facilities as Nichols personnel, including the time clock, parking areas, and restrooms. They apply for positions through the Nichols office, receive a Nichols handbook of rules and regulations, and are entitled to a discount on Nichols purchases. Moreover, the record supports the Board's finding that Store Manager Jones influenced labor relations and other aspects of the Spencer and IMAC operations.

It is noted that the unfair labor practice proceeding involving Nichols' Elmira, New York, store, see footnote 2, also resulted in a determination that employees of that store's licensees were properly included in the bargaining unit. See 380 F. 2d at 139, cited at footnote 2 above.

491 (1947); *N. L. R. B. v. Sun Drug Co.*, 359 F. 2d 408, 412-13 (3rd Cir. 1966); *N. L. R. B. v. J. W. Rex Co.*, 243 F. 2d 356, 359 (3rd Cir. 1957).

This unit numbered 132 employees on October 27, 1966, on which date, the Board found, the Union held 72 valid authorization cards.[12] Nichols attacks the cards on a variety of grounds. The contentions that five cards were obtained by misrepresentations, that a "majority" of the other employees had signed or that no initiation fee would have to be paid (R. brief, pp. 11-13, 15-16), were resolved on the basis of a determination, which is supported by the record, that no substantial misrepresentations were established by the evidence. The claim that seven cards were effectively revoked (R. brief, pp. 17-23) is rebutted by the fact that the efforts of Nichols management to procure the revocations were themselves violative of §8(a)(1). See *N. L. R. B. v. Quality Markets, Inc.*, 387 F. 2d 20, 24 (3rd Cir. 1967). Finally, two cards are questioned on the ground that they were falsely represented to be for the purpose of an election (R. brief, pp. 13-15). The Supreme Court's *Gissel* decision resolves this issue. It approved the Board's "*Cumberland* rule," under which an unambiguously phrased

[12] Payroll records showed that on that date Nichols had 117 employees, Spencer had 3, and IMAC had 11. The two previously discharged employees held entitled to reinstatement brought the total to 133. However, the Board in its decision found it unnecessary to pass on the validity of the authorization cards of five employees (which were accepted by the trial examiner), among whom four were claimed to have falsely predated their cards and one was alleged not to have been an employee when she signed her card. The Board explained that these five cards were not necessary to the Union's majority status. In view of our disposition of the various other challenges to the cards advanced by respondents, we need not consider these cards' validity. However, it seems unfair to put aside as unnecessary a determination as to whether the card of a disputed "employee" should be counted, and then count the employee toward the total number in the unit. Accordingly, though it affects not our decision, we have construed the bargaining unit here as numbering 132 employees on October 27, 1966.

card[9] will be counted unless it is proved that the employee was told it was to be used *solely* for the purpose of obtaining an election. 37 L. W. at 4544. The Court further pointed out that:

> ". . . employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election."

As we read the record, it would be difficult to maintain that the two Nichols employees were even told of the probability of the cards' use to get an election, let alone that they should disregard the language of authorization entirely. We therefore find valid the Board's conclusions that the Union had a majority when it demanded recognition on October 27, 1966, that Nichols refused to bargain under §8(a)(5) by attempting to undermine this majority, and that a bargaining order is a proper remedy.

Since the Board may desire to consider its remedial bargaining order in the light of *Gissel, supra* (37 L. W. at 4547), the cause will be remanded to the Board so that it may be afforded an opportunity to do so.[10]

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[9] There is no contention in the instant case that the cards could be understood to authorize the Union to do anything other than represent the employees for collective bargaining purposes.

[10] The July 1, 1969, letter from counsel for the Board suggests such a procedure.

Decision and Order of National Labor Relations Board.

167 NLRB No. 121 D-261
Dover, Delaware

UNITED STATES OF AMERICA,

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

S. E. NICHOLS-DOVER, INC.; SPENCER SHOE CORPORATION and IMAC FOOD SYSTEMS, INC.

and

RETAIL STORE EMPLOYEES UNION, LOCAL #692 RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

Case No. 5-CA-3664

On June 20, 1967, Trial Examiner Boyd Leedom issued his Decision in the above-entitled proceeding finding that the Respondents had engaged in and were engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondents had not engaged in a certain unfair labor practice and recommended dismissal of this allegation of the complaint. Thereafter, the Respondents filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed exceptions and a supporting memorandum.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions,[1] and recommendations of the Trial Examiner, as modified herein.[2]

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner,[3] as modified below and hereby orders that the Respondents, S. E. Nichols-Dover, Inc., Spencer Shoe Corporation, and IMAC Food Systems, Inc., Dover, Delaware, their officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

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[1] The Trial Examiner inadvertently omitted including in his Recommended Order an order affirmatively requiring Respondent S. E. Nichols-Dover, Inc., to bargain with the Charging Party. The omission is corrected below.

[2] We find it unnecessary to pass upon the validity of the authorization cards of employees Shirley Caswell, Carolyn McNew, Bonnie Lee (Witt) Rattray, Elizabeth Becker, and Robert Thompson, inasmuch as exclusion of these cards would not affect the Union's majority status at the time of the demand. We adopt the Trial Examiner's conclusion with respect to the card of Leona Morris, as she was in fact employed on October 27, and it is immaterial that she may not have been employed on the day before, when she signed her card.

1. The following paragraph 2(a) is added to the Recommended Order:

"(a) Upon request, bargain collectively with the above labor organization as the exclusive bargaining representative of the employees in the above-described unit."

Paragraphs 2(a), (b), (c), (d) and (e) of the Recommended Order are accordingly renumbered 2(b), (c), (d), (e), and (f), respectively.

2. Paragraph 2(c) of the Trial Examiner's amended Recommended Order is amended by substituting the words "on the forms provided" for the words "to be furnished."

Dated, Washington, D. C. Oct 18 1967

JOHN H. FANNING,
Member

HOWARD JENKINS, JR.,
Member

SAM ZAGORIA,
Member

NATIONAL LABOR RELATIONS BOARD

(Seal)

Trial Examiner's Decision, National Labor Relations Board.

TXD-344-67
Dover, Del.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Division of Trial Examiners

Washington, D. C.

S. E. NICHOLS-DOVER, Inc.; SPENCER SHOE CORPORATION and IMAC FOOD SYSTEMS, Inc.

and

RETAIL STORE EMPLOYEES UNION, LOCAL #692 RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

Case No. 5-CA-3664

Walter H. Maloney, Jr., Esq., and George B. Levasseur, Jr., Esq., Baltimore, Md., for the General Counsel.

James Burke, Esq., Elmira, N. Y., for the Respondents.

Mr. John J. Reichenbert, Baltimore, Md., for the Charging Party.

Trial Examiner's Decision

Statement of the Case

Boyd Leedom, Trial Examiner: This case, heard at Dover, Delaware, on March 30 and 31, and April 3 and 4, 1967, pursuant to an original charge and amended charges dated December 5, 1966, and January 9 and April 3, 1967, and a complaint issued on February 17, 1967, presents the questions whether the employees of the three Respondents named in the caption above, constitute an appropriate unit for collective bargaining under the National Labor Relations Act, whether the Union named above represented a majority of employees of the three Respondents on October 27, 1966, and whether the Respondents unlawfully refused to bargain with the Union as required by the Act; whether the Respondents discriminatorily discharged three employees contrary to provisions of the Act; and whether the Respondents engaged in on-the-job harassment of employees and other conduct such as threats, promises and surveillance in violation of Section 8(a) (1).

On the entire record of evidence, my observation of the witnesses as they testified, and on due consideration of the briefs filed, I make the findings and conclusions hereinafter set forth; and determine that Respondents unlawfully (1) refused to bargain with the Union; (2) discharged two employees; and (3) interfered with employees' Section 7 rights; in violation of Section 8(a) (5), (3), and (1) of the Act, respectively.

Findings of Fact and Conclusions of Law

A. *The Employer and the Labor Organization*

I find that the allegations of paragraphs 3 through 8 of the complaint, respecting the nature and the volume of business carried on by each of the named Respondents, are true, and conclude therefrom that Respondents at all times material herein were employers engaged in commerce within the meaning of Section 2(6) of the Act. There is no dispute as to this aspect of the case.

I also find and conclude that the Union named in the caption at all times material herein has been a labor organization within the meaning of the Act, another aspect of the case not controverted.

B. *Background*

S. E. Nichols-Dover, Inc., Respondent herein, is one of a chain of several retail discount stores under common ownership and common direction of labor relations. The two other named Respondents are licensees in the Nichols store at Dover, Delaware, one operating a shoe department and the other (IMAC) operating a snack bar.

The Union has been seeking to organize the total operation since late in 1965, with a diminution in activity meantime because of the prosecution of earlier unfair labor practice proceedings growing out of the union activity. The effort then resumed at an accelerated pace with the result that the Union, claiming to represent a majority of the employees, demanded recognition on or about October 27, 1966. Events led to charges out of which the issues herein arose.

I take official notice of previous cases instituted before the National Labor Relations Board involving the Dover store and another within the Nichols chain and which have been adjudicated at the level of Trial Examiner, the National Labor Relations Board, or in one instance through enforcement of the Board's Order by the Circuit Court of Appeals for the Third Circuit. These cases are *S. E. Nichols Company, et al.*, 156 NLRB 1201 (affirming the decision of Trial Examiner William W. Kapell who found the Respondents in the case in violation of Sections 8(a) (1) and 8(a) (5) of the Act); *S. E. Nichols-Dover, Inc.*, 159 NLRB No. 114 (affirming the decision of Trial Examiner Harold X. Summers who found the respondent in the instant case, that is Nichols of the Dover store, in violation of Section 8(a) (3) and 8(a) (1) of the Act; enfd. F. 2d [C. A. 3]); and the Decision of Trial Examiner Sidney D. Goldberg in *S. E. Nichols-Dover, Inc.*, Case 5-CA-1 3586-1 issued April 7, 1967, in which he found the Respondent Nichols, in the instant case, that is the Dover store, in violation of Sections 8(a) (3) and 8(a) (1) of the Act. This case is now before the Board on exceptions to the Trial Examiner's Decision filed by Respondent.

C. The 8 (a) (1) Violations

The evidence reveals, and I find, that Respondents in their continuing opposition to the Union's effort to organize the store in Dover engaged in unlawful interrogation of the employees.

I credit the testimony of Mrs. Jane Connor that following employee meetings at which Morgan Jones, the Respondents' store manager, spoke against the Union, he contacted Mrs. Connor individually and asked her if she had been approached by union representatives. He

also asked her if the employees in the store had been "running to the union." Still later Jones talked to her about her attendance at a union meeting at Alexander's Restaurant. He told her he did not think the store needed a union and asked her if she had signed a card. This conduct, together with the suggestions made by Jones and other management representatives in employee meetings, coerced the employees, and resulted in Mrs. Connor, and others, writing letters requesting that their union cards be returned to them. I find and conclude that this conduct violated Section 8(a) (1) of the Act.

I credit the testimony of Elaine Hennessy, one of the employees hereinafter found to have been unlawfully discharged, and find that Morgan Jones, store manager, talked to her in his inner office right after a meeting during the Union's organizational campaign, held in Alexander's Restaurant. He asked her what went on at the meeting and told her her husband should not permit her to go to such a place with strange men. A couple of weeks later he asked her on the sales floor if she had heard any rumors from the girls about union activity. She also attended a meeting of employees called by management in the summer of 1966 when company representatives told 15 or 16 girls present that the store did not need a middle man (the Union), that if there was trouble between the employees and the Employer the employees could go directly to the Employer.

Mannfred Brecker, vice president of Respondent Nichol's parent company, visiting the Dover store from the New York office, suggested ways and means that a union card could be revoked for those of the employees who had signed them. If the employees wanted to he said, they could make carbon copies and the Company would keep the copies in the office if the employees desired.

Not long thereafter Hennessy and other employees were told one evening not to punch out at quitting time but to

stay in the office area. They did and store manager Jones made a speech, telling the employees that if any wanted their union cards back, they could get them back because this was a free country. I find and conclude that this conduct on the part of management representatives violated Section 8(a)(1) of the Act.

I credited the testimony of Joanna Fairley and find that she attended an employees' meeting called by Respondents at which management representatives suggested that authorization cards previously signed by employees and delivered to union representatives could be recalled by writing letters. This witness was a shy young girl easily influenced. I find that she was induced to write a letter asking for the withdrawal of her union card through the machinations of Clara Darling, at the time manager of the IMAC snack bar; and that Darling used the influence of Joanna Fairley's mother over Joanna in getting the letter written asking withdrawal of the card. Darling made the envelope and paper readily available for writing the letter. It came from her small desk in the snack bar. Wherever there is a conflict in the testimony of Darling and the witness Joanna Fairley, I discredit Darling and credit Fairley. The demeanor of Darling on the stand revealed a partisanship so in favor of management that much of her testimony cannot be credited. I find and conclude that this conduct on the part of Respondent respecting the witness Joanna Fairley violated Section 8(a)(1) of the Act.

I find and conclude that representations and suggestions made by management representatives in employee meetings induced employee Margaret Pittmann to write a letter asking that her union authorization card be returned to her. In her effort on the witness stand to extricate management representatives from the effort to get her union card returned to her, she gave testimony wholly unbelievable because of its unreasonable character

and inconsistencies. I find from her own testimony that the letter she wrote asking the return of her union card, was stamped, registered and posted by management notwithstanding her earlier testimony that she went across the street from her mother's dwelling and mailed it there herself in a corner mailbox. I find and conclude that the conduct of management in this connection violated Section 8(a)(1) of the Act.

I further find and conclude that the conduct of Respondents respecting the requests of various employees for the return of their union authorization cards was unlawful, intended and tending to coerce the employees in each instance to write the letter requesting the return of the union card, and find and conclude that in each instance Respondent violated Section 8(a)(1) of the Act. This finding, in addition to Jane Connor, Joanna Fairley and Margaret Pittmann, involves the letters of withdrawal of employees Dorothy Myrks, E. Barbara Reed, Helen Shockley (whose withdrawal letter never reached the Union), and Regina Fairley.

In addition to the foregoing violations of Section 8(a)(1) I find and conclude that the following conduct of Respondents violated the same section of the Act:

I credit the testimony of Delores Ippolito and find from her testimony that she was active in behalf of the Union during its organizational campaign, and that she attended the union meeting at Alexander's Restaurant. Soon thereafter, Morgan Jones, store manager, contacted her about it. He told her that he had a spy there, that 14 women attended and he knew who everyone was. Ippolito was another of the employees hereinafter found to be unlawfully discharged. She, along with Elaine Hennessy, and Joyce Burnett, all three office workers at the time, had difficulty in the office one evening over division of work among themselves. Morgan Jones came to the office and during this difficulty which occurred on the

evening of the day a local newspaper carried the report of the previous NLRB proceeding involving Respondents. He was agitated and, notwithstanding his denial, I find that he said essentially this: that if this G. D. union gets in this place, I will lock the doors and if any more problems arise between you girls I will get rid of the three of you and will do the work myself.

I also find that earlier in the summer Jones called Ippolito to his office and asked what she thought the opinion of the girls in the store was, about the Union. He responded to her answer that he could not understand why anyone would want to pay $60 a year to a union, and if anybody wanted a raise they should ask for it. On another occasion he asked her why any adult woman would attend such a meeting as the one the Union held at Alexander's Restaurant. I find and conclude that all of these conversations the store manager had with this witness violated Section 8(a)(1) of the Act.

Counsel for General Counsel argues that statements of a former supervisor, Aubray Cephas, constitutes another violation of Section 8(a)(1). Cephas testified that store manager Jones told him a short while before the employment of Susan Scheel came to an end, that he, the witness, should get on Scheel's back and stay there, that they knew she belonged to the Union, and they were going to get rid of her; that he, the witness, followed these orders and that Scheel's employment soon thereafter did terminate. The circumstances relating to the General Counsel's use of Cephas as a witness indicate that Cephas was almost a volunteer. That is to say, it appears that until Cephas came to the hearing entirely of his own volition as a spectator, the General Counsel had no intention of using him, but upon learning what Cephas' story would be, if called, decided to call him as a witness. The record also reveals that Cephas had been summarily discharged as an employee and supervisor just before the

hearing. While certain aspects of Cephas' testimony impress me favorably I am reluctant to rest a finding of this alleged violation on his testimony because of the strong motivation he had, by reason of his recent, sudden discharge, either to consciously or unconsciously make a case against his employer. I take this position particularly because the finding of the additional 8(a)(1) violation urged by counsel for the General Counsel would not alter the remedy in the case.

D. *The 8(a)(3) Violations*

1. Susan Scheel

It was not until counsel for the General Counsel learned of the testimony that the witness Aubray Cephas would give respecting Susan Scheel, and her termination, that the complaint was amended (during the hearing) to allege that she had been discriminatorily discharged. Employee Scheel had testified at an earlier NLRB proceeding involving Respondents, at the instance of the General Counsel, and had attended the union meeting in August 1966 at Alexander's Restaurant. According to her own testimony, she quit working at Nichols-Dover store about February 15, 1967, because of a rather serious spinal injury. While she was away from work on account of this injury she testified she decided she could not take the "nit picking" to which she was subjected by supervisors, especially Cephas, and so called the store and advised them that she was not coming back. This was on February 28, 1967, and on that day she went to work for Grants, another new, large mercantile establishment just opening.

While Cephas testified, as hereinbefore appears, that he was told by store manager Jones to harass Scheel, regardless of just cause, he also testified that he had

previously complained considerably about Scheel's performance as an employee, for good cause. Scheel's own testimony as to the nature of the complaints made against her which she characterized as "nit picking" do not impress me as constituting any great harassment particularly in view of the type person she appeared to be. Scheel is an outgoing, happy person who from all appearances would not be greatly distressed with the kind of complaints she testified were made about her work performance. She revealed strong capacity to take, and in lesser degree, to give, rebuffs.

Work at the new store, Grants, offered some attraction, even at a reduced wage rate and I am no more persuaded that she quit Nichols because of discriminatory action on account of her union activity, than that she quit voluntarily to take the other job that was available at Grants. Thus, I find that there is lacking a preponderance of the evidence to establish she was unlawfully discharged because of her union activity and recommend that this allegation of the complaint be dismissed.

2. Delores Ippolito

The evidence reveals and I find that Delores Ippolito had gone to work for Respondents when the Dover store opened and had been found to be a satisfactory employee. This is indicated by the fact that after she had voluntarily quit after her first employment, she was taken back when she asked to be returned, and was shown a preference as to her choice of jobs. That is, she had indicated she had wanted to work in the office, and was put on a cash register until an opening occurred and then was given office employment.

Her work in the office involved greater responsibility than her previous employment and involved the handling of money and the cashing of checks of substantial sums.

I find and the evidence clearly reveals that Respondents' management knew of Ippolito's interest in, and support of the Union. She had signed a union authorization card and as hereinbefore appears had attended union meetings. Store manager Morgan Jones had questioned her about these matters and thus learned of them.

I discredit completely the reasons advanced by Respondents for Ippolito's discharge. The reasons given her by management personnel were vague and inconsistent; and the reason for her discharge that seemed to emerge from the evidence offered in behalf of Respondents at the hearing, that is that she was let go as a part of a normal reduction in force following Christmas hirings to meet the Christmas increase in business, is wholly unpersuasive. She had not been hired for the Christmas rush and employees of much less service in the store were retained when she was discharged. Likewise the reason given her at the time of her discharge that she was being let go because of "incompatibility" and again by other representatives of management that she was let go because of "bad attitude" are completely devoid of substance and appear to be only a word and a phrase seized upon as excuses to avoid acknowledging that she was being discharged because of her union activity.

From all the evidence adduced respecting the incident in the office of the store on the night of December 7, when the three girls of the office force were having difficulty among themselves as to division of work, and when Jones came to the office in an agitated state and made much of a newspaper story reporting the hearing that day of charges against Respondents in an earlier NLRB proceeding, I infer that he attached much blame for all of his difficulties with the Union to Ippolito and Elaine Hennessy and that the decision to let them go was considerably advanced by this incident. I credit Ippolito and Hennessy as to Jones' attitude about the newspaper story.

Both, as he well knew, were active union adherents, and displayed qualities of responsibility and leadership that added greatly to his burden in keeping the Union out of the store.

In addition to the foregoing evidence which I would find sufficient to justify a finding of unlawful discharge of Ippolito because of her union activity, there is additional support for the finding. If Respondents actually had been dealing in good faith with Ippolito in letting her go on the ground that she was no longer needed as work lessened after Christmas, and the work force necessarily was to be reduced, her discharge would not have taken place without some kind of understanding as to recall, whenever she might be needed. Her record as a long-time employee (for this store) with satisfactory service (except as Respondents sought to create an appearance of unsatisfactory service in the later weeks of her employment, which I find to be pretense) would clearly have required a discussion with her as to possible recall and some notice of discharge. The termination came however without any notice, and as previously indicated without any satisfactory explanation whatsoever.

Furthermore I credit the testimony of Aubray Cephas, the supervisor who had been discharged just before the hearing began, as hereinbefore mentioned, respecting management's intention to discharge Ippolito and also Elaine Hennessy, because of their union connection. He testified that Martin Wolfe, first assistant manager for Respondents, told him in December 1965 or January of 1966 that both Ippolito and Hennessy were in the Union and that they were both going to be "let go." Soon they were discharged.

This conversation, he testified, took place about a week before both women were terminated. Notwithstanding I failed to rest a finding of an alleged violation of Section 8(a)(1), on the testimony of this witness respecting the

employee Susan Scheel. I credit his testimony here, in part because as I have previously indicated the witness' demeanor and testimony in some respects seemed credible, and in a more significant part because the first assistant manager, Martin Wolfe, to whom this statement is attributed by Cephas, failed to deny that he made the remark concerning these two employees. Furthermore, such a statement by Wolfe would fit what seems to me from all the evidence to be a clear purpose as to Respondents' intention respecting Ippolito and Hennessy. At the time of the statement Cephas was a part of the "team" and according to his own testimony at least was cooperating in the apparent effort of management to keep the Union out of the store. It is entirely plausible that Wolfe would have confided in Cephas as to the intention to get rid of these two employees.

In addition to the foregoing the testimony of Morgan Jones is full of patent inconsistencies as to whether Ippolito was discharged or merely laid off with intention of recall, as to the failure of any notice to her that she might be recalled, as to the fact she has never been recalled notwithstanding that there have been many new employees hired since her termination, and his total inability to disclose from his own records that the reason she had not been recalled was because there had been no opening for her.

Because of the foregoing I find and conclude that Delores Ippolito was discriminatorily discharged because of her union activity as alleged in the complaint.

3. Elaine Hennessy

The unlawful pattern of conduct engaged in by Respondents respecting the discharge of Delores Ippolito, hereinbefore found to be in violation of the Act, was in general followed respecting the discharge of Elaine Hen-

nessy. She, as Respondent knew, was a solid, persistent and effective supporter of the Union. Not only had she signed a card authorizing the Union to represent her but she solicited cards from other employees. She had worked effectively in several positions in the store and had progressively been given more responsibility up to the time of her precipitous discharge. I find the reason advanced by Respondents for her discharge,—that she had violated the rules concerning smoking, to be wholly unpersuasive and clear pretense. I discredit all the testimony offered by Respondents' witnesses relating thereto. In concluding as I do that her discharge violated Section 8(a)(3) as alleged, I rely on the testimony of the former supervisor Aubray Cephas hereinbefore set forth and credited, to the effect that the first Assistant Manager Wolfe had told him about a week before Hennessy's dismissal, that management knew her to be a member of the Union and that her termination was slated at an early date.

E. *The Refusal to Bargain—8(a)(5)*

1. The Unit Question

A threshold unit question in the case is whether employees of licensees (Spencer Shoe Corporation and IMAC Food System, Inc., Respondents named in the caption hereof) of a principal merchandiser in merchandising establishments now in vogue, such as S. E. Nichols—Dover, Inc. is engaged in (commonly called discount stores) can be included along with the employees of the principal and thus constitute an appropriate unit for purposes of collective bargaining. As a general proposition it is established beyond all question that in proper circumstances employees of the licensees are appropriately included the unit of the principal employer. This is not to say, of course, as Board decisions disclose, that in all situa-

tions licensees within such a store must always be included or that the inclusion would always be appropriate.

Respondents concede in the brief that the three employees of Spencer Shoe Corporation may be included, but argue that the unit cannot be appropriate if the employees of IMAC are not excluded. The reasons argued by Respondents for exclusion of the IMAC employees are that the snack bar has separate supervision and administration, its employees do substantially different work from that of the Nichols employees, it has its own "exclusive" store area in an alcove with a lower ceiling, it pays for its own utilities and owns and repairs its equipment and fixtures, establishes its own wage rates and shift hours, hires and supervises its own employees whose hours differ from Nichols' hours, the employees are not interchangeable, and IMAC has its own cash register.

The testimony of Clara Darling, manager of the snack bar, goes much too far in seeking to establish a separate identity for IMAC with respect to the entire operation. Her effort to show IMAC's separate identity by signs posted in the snack bar approaches the ludicrous. Evasive on the difficult questions of cross examination as to just what signs tended to establish the separate identity, the truth emerges that the sign involved is a very small one hanging at the rear of the snack bar space showing in small lettering that IMAC is the licensee for the restaurant operation. This unpersuasive testimony detracts from the rest of her testimony seeking to show no connection with Nichols, the rest of the testimony in and of itself being unbelievable by reason of its exaggeration. Thus, having testified that she had fired a snack bar employee, and reported it by letter to Jones, Nichols' Manager, and on receiving subsequently an inquiry from the employee as to why he had been fired, and admitting she had suggested he talk to Jones who might see it differently, she later testified "it (the IMAC operation) has nothing to

do with Nichols in any way, shape, or form." And this statement followed her previous admission that there was no way any customer could walk into the store and tell that IMAC was not a part of Nichols, that insofar as she knew IMAC never advertised apart from the Nichols advertisements and that IMAC was never closed when Nichols was open or open when Nichols was closed.

From the whole record of evidence and the inferences I can clearly draw from observing the relationship between Morgan Jones, manager of Nichols, and Clara Darling, manager of IMAC, I am satisfied that Jones could and did exert real influence as to labor relations and other aspects of the management of the IMAC operation. Numerous store facilities were common to both Nichols and IMAC, and IMAC receipts passed through Nichols and job applications were made for work with IMAC at the Nichols office.

Substantial reasons for Respondents' acquiescence that employees of Spencer Shoe Corporation may properly be included in the unit, but not those of IMAC, do not appear either from the evidence adduced by Respondent or the arguments made by it in the brief. A practical purpose, however, and perhaps an appealing one for Respondents, appears in the record for their desiring to eliminate IMAC employees from the unit while willing to include the employees of Spencer Shoe Corporation. This purpose is somewhat like the objective of gerrymandering in creating legislative districts. Thus 11 of the 11 employees in the IMAC unit signed union authorization cards while only 1 of the 3 employees in Spencer signed cards. Granting that Respondent attacks the validity of some of the 11 IMAC cards, it would enjoy a significant benefit on the unit question, if IMAC should be excluded.

The testimony of Manfred Brecker, vice president of Nichols' parent company for personnel, to the effect that there is no writing establishing the relationship between

the Respondent Nichols and the two licensees, Spencer Shoe Corporation and IMAC, seems almost incredible. He however should know and testified positively that there is nothing in writing setting up the rights and obligations of the licensees in the Nichols store. His testimony in this respect is weakened however in that he also said under oath that insofar as he knew this lack of an agreement in writing prevailed throughout the chain. Specifically he said he believed there were no written agreements 2 years ago at the Elmira store; while the record and the findings of the Trial Examiner and the Board in the earlier case of *S. E. Nichols Company, etc.*, 156 NLRB 1201 (involving Elmira) reveal that in that case there were written leases. They contain the provision that in the event of any labor dispute involving a licensee, affecting the operation of the store, the licensor is authorized to settle and determine the dispute, with the licensee being subject to termination of the license if it failed to settle according to the licensor's determination. These leases also provide that the licensee must adhere to the wages and fringe benefits and other rules and policies of the licensor with respect to the operation of the store. Brecker also testified that insofar as he knew the arrangement between all of the Nichols' stores and their licensees was basically the same as the terms and conditions prevailing between the Dover store and their two licensees Spencer Shoe Corporation and IMAC. If in fact there are no written agreements between Nichols and its licensees in any of the stores such practice seems so unreasonable and so unbusinesslike (considering that all the licensees insofar as the public is concerned are represented to be a part of the Nichols operation in all advertising and otherwise) as to lead to the speculation that the written leases were eliminated for the purpose of avoiding adverse findings against Nichols in the area of labor relations, such as have been imposed on them in the earlier cases hereinbefore cited.

Not withstanding Brecker's unbelievable statements that Nichols' companies have no right whatever to control the operation of their licensees, in any respect whatever, except to cancel their right to occupancy on some undetermined set of standards, I draw the inference from all the evidence that Nichols does have a degree of control essentially equivalent to that set forth in the Elmira leases, referred to in the earlier decision, and find and conclude that the employees of Nichols, Spencer Shoe Corporation and of IMAC are, under relevant Board decisions, appropriately within the one unit involved in this case, for the purposes of collective bargaining. Such was the holding of the Trial Examiner and the Board in *S. E. Nichols, etc.*, cited above, respecting the Elmira store (156 NLRB 1201, 1204). See the cases cited therein.

2. The Majority Question: the Demand for Bargaining

The significant date for determining the individuals in the unit involved in this case, and whether on such date the Union held valid cards from a majority of the employees in the unit, is October 27, 1966. The Union's letter demanding recognition was dated October 26, 1966, and the evidence indicates and I find that it was received by Respondents on October 27, the day following. There is no real significance whether the critical date be deemed the 26th or 27th. The Union's letter addressed to Manfred Brecker, was answered by counsel for Respondent, on November 1, 1966, in Brecker's absence from his office. This letter indicated that the Company could not recognize the Union because charges (later dismissed) were then pending against it alleging coercive activity on the Union's part by reason of which a card check would not accurately reflect the answers

of the employees; and suggested that there be a National Labor Relations Board election.

While counsel for Respondents argues that the Union's demand was ambiguous and not one actually requiring a response from the employer, no such claim was set forth in the November 1 letter. I find that the Union's letter of October 26 is a clear cut demand for recognition and for the commencement of collective bargaining. There can be no serious question about this.

G.C.'s Exhibit Nos. 4 and 5 list the employees on the Nichols, Spencer Shoe; and IMAC payrolls as of the significant date. This was stipulated, with counsel for Respondent reserving the right to contend that the employees of the licensees should not be included in the unit. The stipulation listing the names of 117 employees of S. E. Nichols Company at Dover (Ex. 5) appears to be an outright stipulation as to the eligibility list as of October 27, 1966, although as it developed in the hearing, counsel for Respondents sought to deviate from this list as hereinafter appears. The names of 131 employees appear on G.C.'s Exhibits 4 and 5. The General Counsel contends that the unit should include two additional employees, Carol (Braun) Roxby, an employee found to have been unlawfully discharged in the case of *S. E. Nichols-Dover, Inc.*, 159 NLRB No. 114, and Elizabeth Rubasky, an employee held to have been discriminatorily discharged in the case of *S. E. Nichols-Dover, Inc.*, decided by Trial Examiner Sidney D. Goldberg, decisions hereinbefore cited. Counsel for Respondent contends that these two employees should not be included in the unit because subsequent events, (their removal from the area) would have made it impossible for them to resume employment as of the eligibility date, October 27. I find and conclude however that they, being entitled to reinstatement under the decisions mentioned are, under the law, members of the unit, bringing the total number of em-

ployees in the unit to 133 subject only to Respondent's contention that some of these employees, notwithstanding the stipulation, should not be included.

As of the crucial date, when the membership of the unit totalled 133 employees, the Union held 77 signed cards, 10 more than a majority; but counsel for Respondent contends that some of these 77 cards are not valid.

The union cards involved in this case are clear, unambiguous authorizations to the Union to represent the signer of the card for collective bargaining purposes under the Act.

Respondents' attack on the cards includes the contention that the letters of withdrawal (hereinbefore referred to in the section dealing with the 8(a)(1) violations) effectively revoked these cards. Inasmuch as I have previously held that the Company's effort in procuring the letters of withdrawal constituted a violation of the Act, the withdrawals are ineffective and the cards to which they relate remain valid authorizations. See *Quality Markets, Inc.*, 160 NLRB No. 1.

The sheer transparency of the effort made by Manfred Brecker to establish his own objectivity and that of the other management representatives who addressed the employees in meetings, respecting the employees' rights "to have a union if they so desire it" is so inconsistent with the background of unlawful opposition Respondents have shown toward the Union, as to render his testimony not only unpersuasive of his claim that there was no effort on management's part to get the employees to withdraw their union authorization cards, but actually makes it clearer that this was in fact Respondents' purpose in calling the meetings. I therefore find and conclude that the Union's 77 authorizations are not diminished in any respect by the effort to get certain of the employees' cards withdrawn.

Notwithstanding Respondents stipulated that the two employees Shirley Caswell and Leona Morris, both of whom signed union authorization cards, were on the eligibility list, that is, were employees in the unit on the critical date for determining union majority, Respondents offered evidence and argue in the brief that the card of neither of these employees should be counted because neither was an employee on the date the demand was made.

Counsel for the General Counsel cites and relies on the case of *Cruis Along Boats, Inc.*, 128 NLRB 1019, for the proposition that Respondents should be held to their stipulation without deviation. The cited case arose in a situation different from the one here, and in my judgment is not authority for the proposition that one who enters into a stipulation such as the one involved here, should be held strictly to it under all circumstances. I am of the view however, and hold that any stipulation deliberately entered into after the parties have had ample time to give careful and sober consideration to the facts agreed upon, should not easily be disregarded. Unless a mistake in stipulating can be shown by clear and convincing evidence the stipulation should prevail. To hold otherwise would result in an unwarranted disruption of orderly and expeditious administractive practices. I therefore look to the evidence adduced by Respondent in ascertaining whether these two employees should be included in the unit and their cards in determining the question of union majority.

The employee Shirley Caswell testified that she went to work the latter part of June 1966 and after working about a month was forced to quit because of a baby-sitting problem. She first testified that she then went back to work the last of September "I believe . . . and worked until after Christmas, the 1st of January." If this testimony were accurate she would have been em-

ployed as of the eligibility date, October 26 or 27, 1966. But her testimony as will hereafter appear, is so uncertain that it cannot support a finding. Following this testimony, on leading questions by Respondents' counsel, she said she believed October 28 was the correct date of her return to work which would eliminate her from the payroll on the critical date. Queried "you don't remember now whether this was in September or October? [that she returned to work]" She replied, "It must have been October . . . I can't swear to the exact date." Her testimony is so uncertain that it leaves in total doubt the date of her return to work as between October 26, 27, or 28. Her union card was dated during her earlier employment, July 19, 1966. The record does not support a finding that her absence because of the babysitting problem was a temporary layoff and so the possibility of resolving the issue on this basis does not exist.

Store manager Jones was then called to testify from the pay records as to when her second term of employment began. He testified after much shuffling of papers, and uncertainty as to the exact records he was looking at. He said "My date of her starting is the 28th of October and that payroll ending would be 11/2. Here's my date [without supplying the foundation record] where she came back right here." When asked on cross examination "When Mrs. Caswell came back to work on, as you put it, on the 26th or 27th or 28th?" Jones testified "Twenty-eighth of October." The examination then continued on for several questions and answers along an unproductive line and seemed to come to a halt. I inquired as to the reason for the period of waiting and counsel for the General Counsel advised that his associate counsel was examining pay records. By agreement the witness Morgan was excused, ostensibly with the intention of recalling him later, and another witness was sworn and testified on another line

of evidence. While Jones resumed the stand he testified no further about the Shirley Caswell employment and at the end of his testimony counsel for General Counsel moved that his testimony as well as that of the employee Shirley Caswell be stricken in that its purpose was to impeach the stipulation. This motion I denied. Jones' statement that the employment began on October 28, 1966, is unpersuasive in that foundation for it is lacking, and I cannot hold that it prevails over the stipulation. Furthermore, the employee Caswell testified that she had called Respondent and talked to Mrs. Pittmann, to find out if she could come back to work and that this occurred at least 2 days before she reported on the job "it wasn't any more than a week, a couple of days, I would say." She had been told by Mrs. Pittmann that there was an opening and that she could have it. Even granting that Jones may have been accurate in his statement that October 28 was the date of Caswell's first actual reemployment (and there is nothing to indicate it would have been later) she became an employee for the purposes of representation as of the time of her employment by Mrs. Pittmann at least 2 days earlier than October 28. Because of the situation as revealed by all of this testimony I find and conclude that Caswell was an employee on the critical date and that her union card previously signed should be counted toward the Union's majority. There is nothing in the evidence sufficiently certain that she was not an employee to warrant setting aside Respondents' stipulation.

The only significant evidence in the record bearing on Respondents' contention that Leona Morris was not an employee on October 26, 1966, is Respondents' Exhibit No. 19, the employee's time card. It shows that her first actual work was done on October 27, 1966. Her authorization card to the Union (erroneously referred to by counsel for Respondents in the record as her time card) is dated October 26, 1966. Because of the

probability approaching certainty, that the employee had knowledge at least a day before she went on the job that she had the employment, plus the fact that she dated the union card the day before, I infer that she was an employee on October 26; and find and conclude that her card should be counted toward the union majority.

Respondent contends that various employees signed their cards after October 26, 1966, and dated them on this date or earlier at the suggestion of the soliciting union representatives, and these cards not being in possession of the Union on the date of demand cannot be counted. One such employee is Carolyn McNew. Her testimony is rather persuasive that she did not go to work for Respondent until October 24 and that she signed the card after she had actually been on the job. There is however, great uncertainty in her testimony as to how much later she signed the card. Notwithstanding that she was pressed with numerous questions by counsel for Respondents, many of which were leading, no clear picture forms that she signed the card on any date later than October 26, 1966. Testimony as meaningful as any other that was inconsistent, is to the effect that she signed the card within a week after she went to work on October 24. This would allow for signing on October 26. There is no intimation in her testimony that any union representatives suggested to her that she date the card on any date different than the one on which she signed it, and she admits that the date on the card she put there, that is October 24. And she confesses she knows no reason why she would have dated it on a date other than the day she signed it. The evidence does not disclose to my satisfaction that the card was not signed on October 24 and so I find and conclude that it must be counted in determining the Union's majority.

The union authorization card of the employee Bonnie Lee (Witt) Rattray is dated October 19, 1966. This employee testified with certainty that October 19 is the day she went to work for Respondent and that she did not sign the card until some time thereafter. But she is uncertain as to how long after she first went to work that she signed the card. She testified it "might be a week to a week and a half, 2 weeks at the most." She also testified that Oscar Hollinger, union representative who solicited her signature, told her to date the cards as of the date she went to work. Hollinger denied that he said any such thing to her and that the signed card was in the possession of the Union when they made the demand for recognition. Hollinger, as the authorization cards in the evidence disclose, followed a practice in the main of making a notation on the back of each card as to the date each was signed and at what place. On the Rattray card, G. C. Exh. 80, there is no such notation as to date the only notation being "Signed at home D. K. & O. H." While this lack of card in the notation would tend to give some credence to Rattray's testimony that she did not sign on October 19, the circumstance loses some significance in that Hollinger did not invariably show the date on all the cards. Because of the uncertainty in Rattray's testimony as to when she signed the card, and Hollinger's denial, I find no support in the evidence for concluding that the card was signed on any date other than the date it bears, and therefore find and conclude the card must be counted toward the Union's majority.

The union authorization card of employee Elizabeth Becker, G. C.'s Exh. 79, bears the date October 21, 1966. This is the date she testified she went to work for Respondent. She also testified, however, that she did not actually sign the card on this date but dated it as she did because Hollinger instructed her to do so. She testified that "maybe about a week" elapsed between

the day she started to work and the day she signed the card. On cross examination she modified this by testifying she thought she went to work on a Friday night and signed the card the following Wednesday or Thursday. Hollinger testified that he definitely did not tell her to date the card any other date than the day she signed; and that the card duly signed was in the possession of the Union when they made the demand for recognition. Because of the employee's uncertainty as to when she signed the card and Hollinger's denial I find nothing in the record to support a conclusion that the date the card bears was not the date it was signed, and therefore hold that the Becker card must be counted toward the Union's majority.

The employee Robert Thompson signed a union authorization card that bears the date "10-25 66." Early in his testimony as to the date he actually signed the card he stated without hesitation that he signed it after Christmas, 1966. He then began to waver stating he really could not be sure when he signed it but thought it was about 2 months after he went to work for Nichols. He was also uncertain as to when he went to work even as to the month. As of the time of the trial Thompson was still in the employ of Nichols as stock clerk. He has difficulty reading, is not at all self-assertive and would be easily influenced by the two representatives or investigators engaged by Respondent to contact the witnesses as the trial was in progress respecting the facts relating to signatures and time and place of signing authorization cards. The union authorization card which he signed, G.C.'s Exh. 33, bears the "Received" stamp of the Fifth Region of the National Labor Relations Board Baltimore, Maryland, indicating receipt of the card in the Baltimore office on December 13, 1966. This completely refutes of course Thompson's testimony that he signed the card after Christmas. His testimony is so uncertain that it furnishes no support

whatever for the contention of Respondent that this card was not signed on the date it bears, that is October 25, 1966, and I therefore find and conclude that the written document as introduced, as in the previous similar cases constitutes the only dependable evidence as to when the card was signed. The Thompson card must be counted toward the Union's majority.

The cards of employees Bonnie Lee (Witt) Rattray, Sandra Santee, Pauline Yike and Barbara Dixon fall into another category of objection raised by Respondents. Respondents argue that the evidence shows these named employees signed their cards only on the misrepresentation of the union solicitors that a majority of the employees had already signed. I reject this contention first on the ground that the evidence does not establish any substantial misrepresentation as claimed, and secondly on the ground that the Board has held "representations of the type here considered are immaterial in determining the Union's majority status on the basis of signed authorization cards, and there appears no reason even for receiving any testimony concerning such matter." *Merrill Axle and Fred Service*, 158 NLRB 107. In the cited case the Board in support of its position quotes language of the court in *N.L.R.B. v. Cactus Petroleum, Inc.*, 355 F. 2d 755 (C. A., 5). I therefore find and conclude that none of the cards of the employees last named above are invalidated by reason of this contention of the Respondent.

I also reject the contention of Respondent that the authorization cards of Albert Tina Haver and Dorothy Lanaras are invalid because obtained on the representation that the only purpose for the cards was to obtain an NLRB election.

It is well established by numerous Board decisions that a clear and unequivocal written authorization to a union to represent the employee who signed the card is not invalidated by any representation that it may

be used for an election of is rendered ineffective as a valid authorization counting towards a union's majority except when the representation made is that the *only* purpose for which the card was obtained was to get an election. The evidence in this case does not support any finding that any card was obtained by any representation made by the union solicitors that the only purpose of obtaining the card was to get an election. I therefore find and conclude that no card is rendered invalid by reason of Respondents' contention that such representations voided the cards of Albertina Hayer and Dorothy Lanarus.

I also reject Respondents' contention that the cards of the employees Pat Seaman and Lynda Satterfield are invalid because obtained on the union solicitors' representation that if the employees would sign the cards as of the date requested they would avoid any initiation fee, whereas if they waited until a later time they would have to pay an initiation fee. I do this on the ground that there is no support in the evidence that the union solicitors made any such representation. On the contrary I find and conclude that such reference as was made to initiation fees was a legitimate one, and so recognized by Board decisions, that is, that the Union involved, during an organizational campaign of an employer not organized, makes no charge of an initiation fee of any employee on the payroll as of the date of the request for recognition. I therefore find and conclude that neither card was signed because of the representation as contended for by Respondents, and that both are valid and count toward the Union's majority.

Employees Edward Bremer, Jack Spencer, and William Hammond are in the Military Service, stationed at Dover Air Base. They worked at the Nichols store during the hours that their Military service permitted, all regularly and for substantial periods per week. Respondents contend that notwithstanding their regular,

part-time employment the uncertainty as to their length of service in the store because of the possibility of their transfer away from the area for Military service at another station, disqualifies them for membership in the unit, and that the authorization cards they signed should therefore not be counted. I find and conclude that there is no substance to this contention and hold that the cards of these employees are valid and should be counted towards the Union's majority. Respondent also claims that W. Richard Wynder was a casual employee of Spencer Shoe Corporation and that his card should not be counted. There is no question however from the evidence that as of the time of the demand for recognition he was a regular employee entitled to a representation in the unit. The circumstance on which Respondent relies to make its contention respecting him is that in the course of the Employer's business it became expedient to offer him a job at a distant location and rather than relocate the employee quit his job with Respondents so that he might apply for admission to a college located at Dover. The right to representation as a member of a bargaining unit is not determined by hindsight, and the rule respecting Wynder is no different than the rule that would apply to any eligible employee, who after the event of an election or demand for recognition, quits for whatever purpose. He would be entitled to vote in an election, entitled to have his authorization card counted if majority is being determined by cards and to have representation up to the time he chooses to terminate his employment. This is elementary. His card must be counted in determining the Union's majority.

Inasmuch as I have made the foregoing determinations that none of Respondents' attacks is valid on the 77 authorization cards the Union held from employees in a unit numbering 133, I find and conclude that as of the date the Union made its demand for recognition

it did represent a majority of the employees in the unit. I also find and conclude from the whole record of evidence that Respondents did not act in good faith when they refused to recognize and bargain with the Union, but on the contrary sought time to undermine the Union's majority as evidenced by their repeated and quite flagrant unfair labor practices. Respondents' conduct reveals a disposition to reject collective bargaining. I therefore find and conclude that they violated Section 8(a)(5) of the Act as alleged in the complaint.

I have made certain corrections in the record pursuant to motions filed by the Respondents and in behalf of the General Counsel, by a separate order.

The Remedy

Having found that Respondents have engaged in, and are engaging in unfair labor practices I shall recommend that they cease and desist therefrom and take certain affirmative actions more fully set forth in the Recommended Order that follows, including the posting of an appropriate notice, to effectuate the policies of the Act.

Recommended Order

Upon the entire record in this case and the foregoing findings of fact and conclusions of law I recommend that Respondents S. E. Nichols-Dover, Inc.; Spencer Shoe Corporation, and IMAC Food Systems, Inc., their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in any labor organization by discriminating in regard to hire, tenure, or other conditions of employment.

(b) Interrogating employees about a union or about their attitude toward the Union.

(c) Encouraging or in any manner aiding their employees to withdraw their membership from or support for any union or to discourage the employees in any manner from attending union meetings.

(d) In any other manner, interfering with, restraining or coercing their employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or any mutual aid or protection, and to refrain from any and all such activities except to the extent that any such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

(e) Refusing, upon request, to bargain collectively with Retail Store Employees' Union, Local 692, Retail Clerks International Union, AFL-CIO, as the exclusive representative of their employees in the unit hereafter described as to wages, hours and other terms and conditions of employment. The unit consists of all employees employed at the Nichols-Dover, Delaware store including leased department employees and office clerical employees, but excluding guards and supervisors as defined in the National Labor Relations Act, as amended.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer Elaine Hennessy and Delores Ippolito reinstatement to their former positions even though this may necessitate displacement of present incumbents (or, if the position of either no longer exists, to a substan-

tially equivalent position) without prejudice to seniority or other rights and privileges, and to make each whole for any loss of earnings suffered by payment to each of a sum of money equal to the amount she would have earned from the date of her discharge to the date of Respondents' offer of reinstatement, less her net earnings during said period. Backpay shall be computed on a quarterly basis in a manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon at the rate of 6 percent per annum computed quarterly.

(b) Notify the said Elaine Hennessy and Delores Ippolito, if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security records, timecards, and personnel records and reports necessary to analyze the amount of backpay due and the right of reinstatement.

(d) Post at their place of business at Dover, Delaware, copies of the notice attached hereto as Appendix. Copies of such notice, to be furnished by the Regional Director for the Fifth Region, shall, after being duly signed by authorized representatives of Respondents, be

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In the event that these Recommendations be adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommendations of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "A Decision and Order."

posted immediately upon receipt thereof and be maintained for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that such notices are not altered, defaced, or covered by any material.

(c) Notify the Regional Director for the Fifth Region in writing, within 20 days from the date of receipt of this decision what steps the Respondent has taken to comply herewith.

Dated at Washington, D. C.

BOYD LEEDOM
Trial Examiner

In the event these Recommendations be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

Form NLRB-4635A
(11-65)

TXD-344-67

NOTICE TO ALL EMPLOYEES

Pursuant to

The Recommended Order of a Trial Examiner of the

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT
(as amended)

we hereby notify our employees that:

WE WILL NOT discourage membership in Retail Store Employees' Union, Local #692, Retail Clerks International Union, AFL-CIO, or any other local organization, by discriminating as to the hire, tenure or any other term or condition of employment of any of our employees.

WE WILL NOT ask employees about a union or about their attitude toward any union; and we will not encourage or aid any employee in any manner whatsoever to withdraw his or her membership from, or her support for any union.

WE WILL NOT, in any other manner, interfere with, restrain or coerce our employees in the exercise of their right to self-organization; to form, join or assist a labor organization, to bargain collectively through a bargaining agent chosen by themselves; to engage in any other concerted activities for the purposes of collective bargaining or other mutual aid or protection; or to refrain from any such activities (except to the extent that the right to refrain is limited by the lawful enforcement of a lawful union security requirement).

WE WILL offer Elaine Hennessy and Delores Ippolito their former or substantially equivalent job (without prejudice to seniority or other employment rights and privileges) and we will pay each for all loss suffered because of our discrimination against her.

WE WILL upon request bargain collectively with Retail Store Employees' Union, Local #692, Retail Clerks International Union, AFL-CIO, as the exclusive representative of our employees in the unit hereafter described as to wages, hours and other terms and conditions of employment. The unit consists of all employees employed by us at the Nichols-Dover, Delaware store, including leased department employees and office clerical employees, but excluding guards and supervisors as defined in the National Labor Relations Act, as amended.

All our employees are free to become or remain members of any labor organization or to refrain from becoming such members.

Dated .....

S. E. NICHOLS-DOVER, Inc.
(Employer)

By .....
(Representative) (Title)

Dated .....

SPENCER SHOE CORPORATION
(Employer)

By .....
(Representative) (Title)

Dated .....

IMAC FOOD SYSTEMS, Inc.
(Employer)

By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Building, Room 1019, Charles Center, Baltimore, Md. 21202 (Tel. No. 962-2909).

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No. 482

In the Supreme Court of the United States

OCTOBER TERM, 1970

S. E. NICHOLS-DOVER, INC., ET AL., PETITIONERS

v.

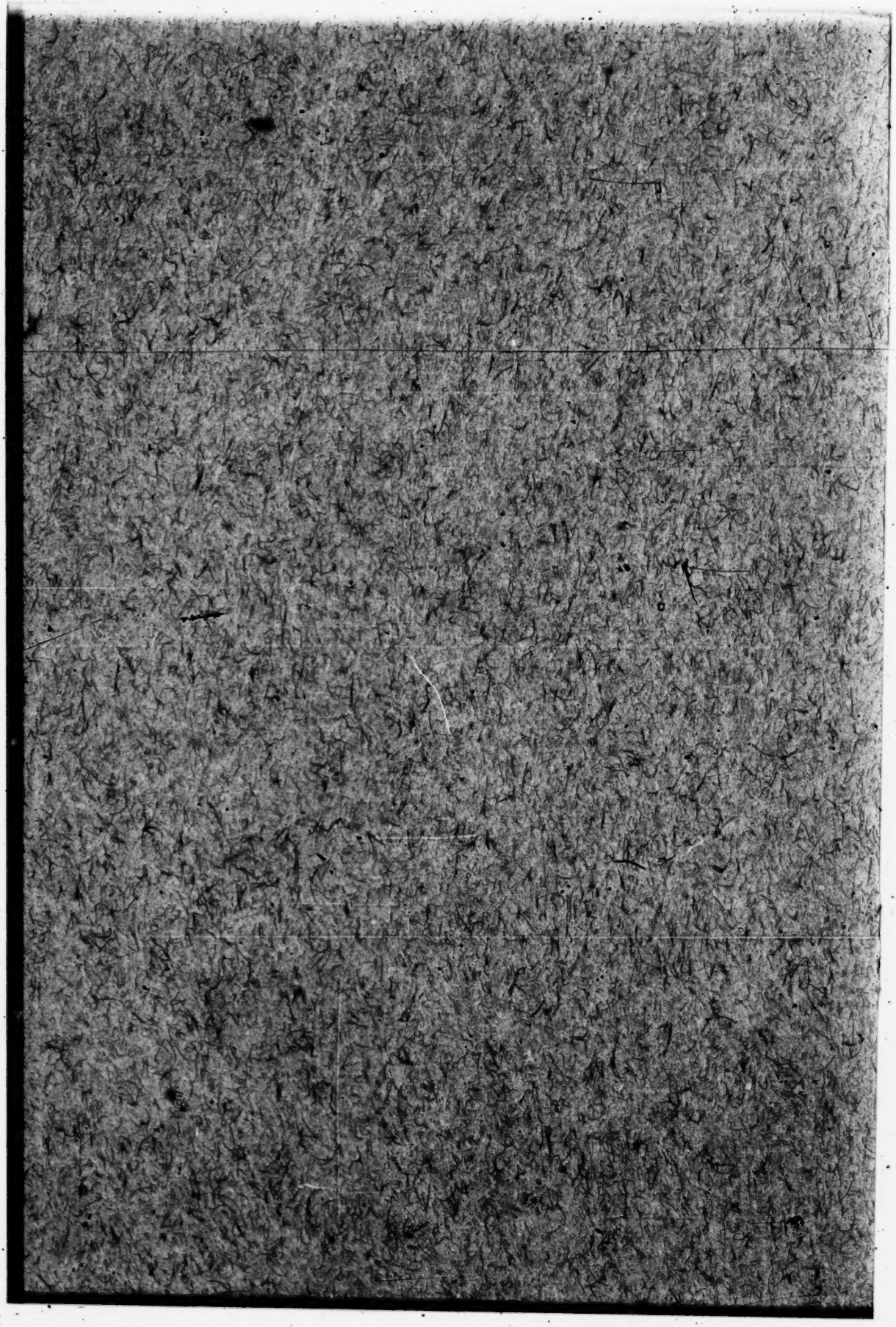
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.



In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 452

S. E. NICHOLS-DOVER, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The supplemental judgment of the court of appeals (Pet. 13-15) was entered on April 23, 1970. The 90-day period for filing a petition for a writ of certiorari prescribed in 28 U.S.C. 2101(c) expired on July 22, 1970.[1] No timely extension for petitioning was sought, and the petition was filed on July 24, 1970.

[1] The time for petitioning began to run when the supplemental judgment was entered on April 23, 1970, and not, as petitioners suggest (Pet. 2), when the court on May 15, 1970, issued a certified copy of the supplemental judgment in lieu of a formal supplemental mandate (Pet. 15). Stern and Gressman, *Supreme Court Practice*, p. 246 (4th ed., 1969).

The petition is untimely, the Court has no jurisdiction to entertain it, and it should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

AUGUST 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 400311 88

SUPREME COURT, U. S.

Supreme Court of the United States

October Term, 1970.

No. 452

S. E. NICHOLS-DOVER, Inc., *et al.*,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Reply Memorandum of Petitioners to Memorandum for the National Labor Relations Board in Opposition.

James L. Burke,
Attorney for Petitioners,
315 Lake Street,
Elmira, N. Y. 14901

The Reporter Company, Inc., Walton, N. Y. 13856—607 865-4131—1970

In the

Supreme Court of the United States

October Term 1970.

No. 452

S. E. Nichols-Dover, Inc., *et al.*,

Petitioners,

v.

National Labor Relations Board.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Reply Memorandum of Petitioners to Memorandum for the National Labor Relations Board in Opposition.

Petitioner opposes the Solicitor General's request for dismissal on two counts:

First—The petition by its nature must be an appeal from the final action of the Circuit Court relating to the merits. This action was issuing a judgment May 15, 1970, which judgment could have amended the judgment of April 23, 1970.

Second—The petition was timely filed per entry as of April 23, 1970. The petition was mailed with accompanying letter and a copy mailed to the Solicitor General, Monday, July 20, 1970, at the Main Post Office, Elmira, New York. Petitioner received acknowledgment from the Solicitor General that he had received the petition, which acknowledgment was dated July 22, 1970.

The Clerk of the Supreme Court received petitioner's accompanying letter July 22, 1970. The package containing the balance of petitions was not entered until July 24, 1970, because of unforeseeable acts in transit, not the fault of petitioner, but excusable under all circumstances.

The facts are, a letter stating the petitions and Circuit Court record were mailed by separate cover was directed to the Clerk of the Supreme Court, a letter containing a copy of the petition directed to the Solicitor General, and two packages, one containing forty petitions and the other the record of the Third Circuit, were mailed, midafternoon, July 20, 1970, at the Main Post Office, Elmira, New York, first class, with proper postage for first class, identified as first class. Annexed as Exhibit A is a copy of the letter from the Solicitor General, dated July 22, acknowledging receipt of the petition. The Clerk of the Supreme Court received the covering letter July 22, but did not receive the packages of petitions and the court record until July 24.

The Postmaster at Elmira, New York, was asked to investigate. He reported to this counsel that a package mailed midafternoon first class from Elmira, New York, would normally be delivered at Washington the next day, July 21, that it was his opinion a post office employee had made an error, one that has occurred several times before, the error being upon seeing a large package the employee did not investigate, but assumed they were third-class mail and threw them in the third-class mail shipping crates. He said it would take one to two days longer to deliver third class than first class from Elmira to Washington.

Under these circumstances it would appear neglect upon the part of the Post Office Department was the cause of late filing as effectively as if the packages were lost in transit.

Additional petitions, under the new rule, were promptly sent to the Solicitor General.

Petitioner pleads that in all justice the Solicitor General having received the petition within the time, and the court having received the covering letter on time, with the packages delayed because of excusable inadvertence, the petition should be deemed timely filed.

Respectfully submitted.

JAMES L. BURKE,
Attorney for Petitioners,
315 Lake Street,
Elmira, N. Y. 14901

Exhibit A.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970.

S. E. NICHOLS-DOVER, Inc., SPENCER SHOE CORP., and IMAC FOOD SYSTEMS, Inc.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 452

Service of One copy of Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit is acknowledged this 22nd day of July, 1970.

ERWIN N. GRISWOLD
Solicitor General